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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 459

RALPH O. BROWNFIELD, PETITIONER

v.

TRUMAN H. LANDON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court granting respondent's motion for summary judgment (Pet. App. 1a–2a) are not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. App. 2a–10a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1962 (Pet. App. 2a). The petition for a writ of certiorari was filed on September 25, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether statements made by the Inspector General of the United States Air Force in conference with a Congressman and an interested private citizen respecting an investigation of improper conduct on the part of an Air Force officer in connection with military procurement were absolutely privileged.

STATEMENT

This action was commenced by petitioner Brownfield, a retired United States Air Force officer, for damages for slander against respondent Landon, who was a lieutenant general serving as Inspector General of the United States Air Force at the time of the alleged defamation. The complaint alleged that respondent Landon "with malice and malicious intent" made false and defamatory oral statements about petitioner to two persons in respondent's office in the Pentagon on or about October 13, 1955. The two persons were Congressman Victor Wickersham, a representative from Oklahoma and a member of the House Armed Services Committee, and Robert E. McNett, head of Royal Electric Company (J.A. 2–4).[1]

1. *Relevant Facts.* In May 1955, the Office of Special Investigations of the Air Force (hereinafter referred to as OSI) initiated an investigation of alleged irregular conduct on the part of command personnel at the Middletown Air Materiel Area, Olmstead Air Force Base, Pennsylvania (J.A. 31). This investigation involved Royal Electric Company of Day-

[1] This reference is to the joint appendix in the Court of Appeals which has been filed in this Court.

ton, Ohio, a Government contractor, of which Robert E. McNett was president, and the company's relations with Air Force personnel, including petitioner Brownfield. At that time, petitioner was a brigadier general on duty at Middletown. Respondent, as Inspector General of the Air Force, was in charge of the OSI (J.A. 7).

In June and July 1955, respondent received reports on the investigation indicating the possibility of improper contract awards to Royal Electric Company based, at least in part, on the offer and acceptance of gratuities by Air Force personnel, and implicating petitioner Brownfield (J.A. 75–97).

On or about August 1, 1955, the case was submitted by the Air Force to the Department of Justice for consideration of criminal action. In response to the request of the Judge Advocate General of the Air Force (J.A. 97–99; 118–122), the Assistant Attorney General in charge of the Criminal Division, Department of Justice, authorized the Air Force to continue the investigation. He further advised the Air Force that the case was being submitted to the United States Attorney in Scranton, Pennsylvania, for determina-

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Respondent reported directly to the Chief of Staff. His duties included, among others, the exercise of staff supervision over and the establishment of standards, policies and procedures relative to inspections and investigations; the providing of policy concerning the security of the Air Force establishment and safeguarding of military information; the conduct of inspections and surveys of Air Force activities; the conduct of investigations of matters involving major crimes, violations of public trust and subversive activities, and of complaints or allegations pertaining to administrative irregularities, or irregular action of personnel (J.A. 20–22).

tion of whether criminal prosecution under bribery and conflict of interest statutes was warranted; and he requested that copies of OSI reports reflecting the results of further inquiries be submitted to the Criminal Division and to the Office of the United States Attorney (J.A. 123–127). Thus, primary investigative jurisdiction of the case continued in OSI until the conclusion of criminal proceedings in the Middle District of Pennsylvania in 1958 (J.A. 100–102; 104–116).

After further investigation by the OSI, and following an administrative reprimand and a recommendation by his superior that petitioner be reduced to his permanent grade of colonel and be transferred from the Air Materiel Command (J.A. 23–25; 101), petitioner reverted to his permanent rank on October 1, 1955 (J.A. 25).

In the interim, McNett, president of Royal Electric Company, had learned of the OSI investigation and contacted Representative Wickersham who knew that Royal and petitioner were charged with irregularities (J.A. 39–40). As a result of a request from Representative Wickersham, acting in his official capacity as a member of Congress and of the House Armed Services Committee, Lieutenant General William D. Eckert, who at that time was Assistant Chief of Staff for Materiel, USAF, with headquarters in the Pentagon, met in his office on October 11, 1955, with Representative Wickersham and McNett (J.A. 14–15; 56). The two visitors discussed the OSI investigation and the manner in which it was conducted, the matter of a patent which petitioner

Brownfield had sold to Royal Electric, and the fact that Royal had apparently been placed on the debarred bidders list by the Air Force (J.A. 15–18; 34–35). At the request of the Congressman and McNett, General Eckert arranged a conference for them with respondent Landon (J.A. 17–18; 45). At the conference, which took place on October 13, 1955, there were present Representative Wickersham, McNett, General Landon, and the General's Executive Officer, Colonel Powel. It was at this meeting that the allegedly slanderous words are said to have been uttered.

Representative Wickersham opened the discussion by commenting on the investigation of Royal Electric Company and criticizing the attitudes and methods of the investigators. He said the investigators should be investigated, and suggested that Congress or one of its committees could perform that task. It was in responding to this observation that respondent Landon is alleged to have slandered petitioner (J.A. 26–28).

General Landon agreed to the conference only because one of the two persons was a Congressman (J.A. 8). The Secretary of the Air Force explained the existing policy governing conferences between officials of the Air Force and members of Congress, concluding that, in the circumstances, "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham and Mr. Robert E. McNett, President of the Royal Electric Company, Inc." (J.A. 13–14).

2. *Proceedings Below.* In his answer to the complaint seeking damages for the alleged slander, respondent Landon admitted conferring with Representative Wickersham and McNett, denied making the alleged statement, pleaded the truth of the statements which he did make, and stated that "any and all actions taken or words spoken in the premises by him were in the course and conduct of his official duties as Inspector General of the United States Air Force and are and were absolutely privileged" (J.A. 5–6).

On November 27, 1959, respondent filed a motion for summary judgment with accompanying affidavits and exhibits (J.A. 6, 7, 13, 14, 18, 19, 23, 25). Petitioner filed an opposition with accompanying affidavits and exhibits (J.A. 26, 29, 30, 31). On June 3, 1960, the motion was denied by District Judge Youngdahl on the ground that there were disputed material facts, "particularly those concerning the circumstances under which the defendant made the alleged defamatory statements" (J.A. 33–34).

After the taking and filing of depositions of the persons involved in the incident (J.A. 34, 48, 50, 72, 73; see also 75, 77, 86, 90, 97), and the filing of further exhibits (J.A. 100, 101, 103, 104, 116), respondent, "on the basis of further discovery since June 3, 1960," again moved for summary judgment, asserting that there now remained no genuine issue of material fact and that respondent was entitled to judgment as a matter of law (J.A. 99). The district court (Matthews, J.) agreed; and on November 21, 1961, entered an order granting respondent's motion for summary judgment (J.A. 127–128).

The Court of Appeals affirmed. It held, *inter alia*, that the "purpose of the conference was to discuss the investigation, the surrounding facts of which were fully known to all parties present"; that "since the investigation involved improprieties alleged to have arisen in connection with certain business transactions between plaintiff and Royal, it is obvious there could have been no discussion of the investigation without reference to plaintiff's activities, the two being inseparably linked"; that on respondent's second motion for summary judgment there were no genuine issues of material fact precluding judgment; that the statements were made in the course of matters committed by law to respondent's control or supervision; and that, under this Court's decisions in *Barr* v. *Matteo*, 360 U.S. 564, and *Howard* v. *Lyons*, 360 U.S. 593, the statements made by respondent were absolutely privileged (Pet. App. 2a–10a).

ARGUMENT

The principles laid down by this Court in *Barr* v. *Matteo*, 360 U.S. 564, are controlling here. Since the case turns entirely upon the application of those principles to the particular facts and circumstances, no question of general importance is presented. Moreover, the decision below is clearly correct. The petition for a writ of certiorari should therefore be denied.

1. In the *Barr* case and in *Howard* v. *Lyons*, 360 U.S. 593, decided the same day, this Court reiterated the rule that acts of public officials, including their public statements, which are related to matters committed to their control or supervision are absolutely

privileged. Notwithstanding petitioner's suggestion to the contrary, there is no justification for re-examining *Barr* and the long line of cases on which it rests. Indeed, in *Barr,* this Court in effect reaffirmed its earlier rulings in *Spalding* v. *Vilas,* 161 U.S. 483, and *Yaselli* v. *Goff,* 12 F. 2d 396 (C.A. 2), affirmed, 275 U.S. 503, and ratified the decisional law of the lower courts. See *Barr* v. *Matteo,* 360 U.S. at 572 and fn. 9; 3 Davis, *Administrative Law Treatise,* Sec. 26.01 (Pocket part, 1960) ("the law before the Barr decision was overwhelmingly what the majority held it to be in the Barr case * * *").

2. Petitioner suggests that the rule affirmed in *Barr* is, in any event, inapplicable because only acts, and not words, are the proper subject of privilege. The argument is untenable. If accepted, it would nullify the very protection for public officials which absolute privilege is designed to afford. As this Court pointed out in the *Barr* case, the reason for the recognition of privilege is that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government." 360 U.S. at 571. To say, as petitioner does, that Barr's action in issuing the press release might have been privileged but that the words he used therein were not, is to make a mockery of the doctrine. The same considerations govern whether official conduct consists of acts or

words. And, notwithstanding petitioner's contention to the contrary, this has always been the rule. Absolute privilege has been invoked traditionally by federal courts for the protection of public officials in numerous suits for defamation prior to this Court's decision in *Barr*. See, *e.g.*, *Newbury* v. *Love*, 242 F 2d 372 (C.A.D.C.); *Glass* v. *Ickes*, 117 F. 2d 273 (C. A.D.C.), certiorari denied, 311 U.S 718; *Mellon* v. *Brewer*, 18 F. 2d 168 (C.A.D.C.), certiorari denied, 275 U.S. 530; see also cases cited in *Barr*, 360 U.S. at 572, fn. 9. And, since *Barr*, this Court, in a number of cases not substantially different from the present one, has denied petitions for writs of certiorari. See, *e.g.*, *Poss* v. *Lieberman*, 299 F. 2d 358 (C.A. 2), certiorari denied, 370 U.S. 944; *Meredith* v. *Van Oosterhout*, 286 F. 2d 216 (C.A. 8), certiorari denied, 365 U.S. 835; *Sauber* v. *Gliedman*, 283 F. 2d 941 (C.A. 7), certiorari denied, 366 U.S. 906.

3. Nor is there merit in petitioner's contention that the lower court in this case extended the doctrine beyond the *Barr* decision (Pet. 8). As we read petitioner's argument on this point, he contends that *Barr* is limited to officials of policy-making rank and action in a policy-making capacity; that respondent was not thus acting at the time the alleged defamation took place; and that respondent's action was outside the scope of his official duties. But *Barr* itself made plain (360 U.S. at 572–574), and *Howard* v. *Lyons*, 360 U.S. 593,[3] confirmed, that the privilege does not depend on

[3] In that case, the Court granted absolute privilege to statements made by a captain in the Navy in a report to his superior, a copy of which was also sent to the Massachusetts delegation in Congress in accordance with standard Navy procedure.

the rank of the official. The only pertinent inquiry is whether there exists a reasonable relationship between the action complained of and the officer's duties, mandatory or discretionary. 360 U.S. at 573–574, 575.

Measured by this standard, the Court of Appeals was clearly correct in holding respondent's challenged action absolutely privileged. The Secretary of the Air Force unequivocally stated that "it was incumbent upon General Landon, as Inspector General of the United States Air Force, to confer with Congressman Victor Wickersham and Mr. Robert E. McNett, President of the Royal Electric Company, Inc." (J.A. 13–14). Cf. *Howard* v. *Lyons, supra,* at 597–598, and n. 2. And, as the court below noted, the purpose of the conference was to discuss the investigation of improprieties alleged to have arisen in connection with the business transactions between the petitioner and Royal (Pet. App. 4a), and the discussion necessarily involved reference to petitioner's activities. Patently, petitioner's contention that respondent was not acting within the scope of his official duties when the defamatory statements were allegedly made cannot stand.

4. Finally, petitioner has not, and cannot, show the existence of any genuine issue of material fact to defeat the summary judgment in respondent's favor. While the Middletown case had been referred to the Justice Department prior to the date of the conference on October 13, 1955, the record establishes that investigative authority continued in the Office of Special Investigations under respondent's jurisdiction (J.A. 100; 123–127); and that in fact further

investigation was made, including further interviewing of petitioner (J.A. 31; 101–102). There is no contradiction between the finding of one district judge that the case was not then ripe for summary judgment and the contrary finding of another judge, seventeen months later, on a greatly expanded record. The ultimate conclusion, affirmed by the Court of Appeals, is clearly correct and does not require further review by this Court. See *Graver Tank & Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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